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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1285

MAY 18 1972
MICHAEL RODAK, JR., CLERK

PFIZER INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION and THE UPJOHN COMPANY,

Petitioners,

—against—

HONORABLE MILES W. LORD, United States District Judge for the District of Minnesota, STATE OF KANSAS and NAMED PLAINTIFFS IN FORTY-EIGHT OTHER CASES,

Respondents.

REPLY BRIEF FOR PETITIONERS

JULIAN O. VON KALINOWSKI
515 South Flower Street
Los Angeles, California 90071

and

LAWRENCE J. HAYES
332 Hamm Building
St. Paul, Minnesota 55102
Attorneys for Petitioner
Pfizer Inc.

MERRELL E. CLARK, JR.
40 Wall Street
New York, New York 10005
Attorney for Petitioner
Bristol-Myers Company

ROBERTS B. OWEN
888 Sixteenth Street, N.W.
Washington, D.C. 20006
Attorney for Petitioner
The Upjohn Company

SAMUEL W. MURPHY, JR.
Two Wall Street
New York, New York 10005

and

PETER DORSEY
2400 First National Bank Building
Minneapolis, Minnesota 55402
Attorneys for Petitioner
American Cyanamid Company

ALLEN F. MAULSBY
One Chase Manhattan Plaza
New York, New York 10005
Attorney for Petitioner
Squibb Corporation

JOHN D. FRENCH
Northwestern Bank Building
Minneapolis, Minnesota 55402
Attorney for Petitioners
Bristol-Myers Company
Squibb Corporation
The Upjohn Company

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Petitioners submit this brief in reply to two assertions made in the Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, filed May 8, 1972.

1. Respondents criticize the "appearance of bias" test urged by petitioners as "subjective" and "equivalent to a pre-emptory challenge not susceptible to judicial review. . . ." (Respondents' Brief at 17-19) On the contrary, the test we urge on the authority of *Berger* v. *United States*, 255 U.S. 22 (1921), is whether the facts and reasons alleged in a disqualification application give "fair sup-

port" to a party's apprehension of bias and constitute a "substantial and formidable" showing of that bias and prejudice. Such a test is neither subjective nor peremptory, for it focuses judicial inquiry upon objective aspects of a judge's conduct to determine whether, on the basis of the averments in the application, there is reasonable cause to conclude that bias or prejudice appeared to be present. It is the standard applied, erroneously we submit, by the Court of Appeals that is subjective, for that standard requires speculation as to the source and nature of the judge's prejudice and necessarily involves the courts in an analysis of the judge's mental state.

The findings of the Court of Appeals, set forth at 6-8 of the Petition, demonstrate that objective appraisal of the conduct of Judge Lord provides ample basis for concluding that he appeared to be biased. Indeed, as the Eighth Circuit stated at the conclusion of its decision:

> "A trial judge, unless he carefully weights his pretrial comments, may very well leave the impression that he has improperly prejudged the case, a situation which seems to have occurred here. It is important that the litigant not only actually receive justice, but that he believe that he has received justice. A judge, like Caesar's wife, should be above suspicion.
>
> "Finally, we must consider respondents' motion for damages. We initially observe that this is a close case. We are convinced of petitioners' sincerity and good faith in filing their affidavits even though we have ruled adversely to their contentions. Clearly, some of Judge Lord's remarks have unnecessarily shaken petitioners' confidence in his impartiality. Accordingly, we deny respondents' motion for damages and costs.

> "Although we deny the petition for recusal, we add a caveat. This record adversely reflects upon Judge Lord's conduct during the pretrial proceedings. Reluctantly, we have pointed out his shortcomings in this case. We demand of Judge Lord, as we do of every trial judge in this circuit, a high standard of judicial performance with particular emphasis upon conducting litigation with scrupulous fairness and impartiality. We commend to Judge Lord the Socratic definition of the four qualities required of every judge: to hear courteously; to answer wisely; to consider soberly; and to decide impartially." (Petition at 29a)

Application of the "appearance of bias" test to the facts found by the Court of Appeals compels disqualification in this case. Plainly it would not, as respondents contend, sanction the equivalent of a peremptory challenge turning on the subjective whim of a party.

2. Respondents assert that petitioners can find no case since *Berger* which adopted the "appearance of bias" test. While we believe that *Berger* and the legislative history of the statute are sufficient authority (see Petition at 8-10), we point out that there are cases which read *Berger* as petitioners do and adopt and apply this test in clear and unmistakable terms. In *United States* v. *Quattrone*, 149 F.Supp. 240 (D.D.C. 1957), the court said:

> "'When there is ground for believing that such unconscious feeling may operate in the ultimate judgment, *or may not unfairly lead others to believe they are operating*, judges recuse themselves. They do not sit in judgment. They do this for a variety of reasons. *The guiding consideration is that the administration of justice should reasonably appear to be disinterested*

as well as so in fact.'" (Emphasis in original) 149 F.Supp. at 242, quoting from the statement of Frankfurter, J., in *Public Utilities Commission* v. *Pollack*, 343 U.S. 451, 466-67 (1952).

Accord, *Whitaker* v. *McLean*, 118 F.2d 596 (D.C. Cir. 1941) ("the policy underlying [the statute] is that the courts of the United States 'shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial'; *i.e.*, shall appear to be impartial" (quoting *Berger*)); *Connelly* v. *United States District Court*, 191 F.2d 632, 637 (9th Cir. 1951) ("there . . . shall be such an atmosphere about the proceeding that the public will have the 'assurance' of fairness and impartiality"); *Schmidt* v. *United States*, 115 F.2d 394, 398 (6th Cir. 1940) ("to eliminate the 'chance' that [unfairness permeated the trial] . . . the judgment should be reversed and the cases remanded for further proceedings before another judge").

The United States, one of the respondents here, has likewise taken the position that appearance of bias is sufficient to disqualify under the statute. In *United States* v. *Bryan*, 393 F.2d 90 (2d Cir. 1968), the Government urged that even if the disqualifying affidavit fell short of establishing actual bias, disqualification was required if it showed the reasonable appearance of bias: "The salutary rule of the courts is that disqualification is required where an appearance of partiality has been given." Brief for Petitioner United States at 39, *United States* v. *Bryan*, *supra*. The Second Circuit found it unnecessary to pass upon the allegations of actual bias in the Government's petition because it held that retrial should be had before a different judge in order to minimize "even a suspicion of partiality". 393 F.2d at 91.

Conclusion

For these reasons, and the reasons stated in the Petition, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

JULIAN O. VON KALINOWSKI
515 South Flower Street
Los Angeles, California 90071

LAWRENCE J. HAYES
332 Hamm Building
St. Paul, Minnesota 55102
Attorneys for Petitioner
Pfizer Inc.

Of Counsel:

GIBSON, DUNN & CRUTCHER

MAUN, HAZEL, GREEN, HAYES,
SIMON & ARETZ

SAMUEL W. MURPHY, JR.
Two Wall Street
New York, New York 10005

PETER DORSEY
2400 First National Bank
Building
Minneapolis, Minnesota 55402
Attorneys for Petitioner
American Cyanamid Company

Of Counsel:

DONOVAN LEISURE NEWTON
& IRVINE

DORSEY, MARQUART, WINDHORST,
WEST & HALLADAY

MERRELL E. CLARK, JR.
40 Wall Street
New York, New York 10005
Attorney for Petitioner
Bristol-Myers Company

Of Counsel:

WINTHROP, STIMSON,
PUTNAM & ROBERTS

ALLEN F. MAULSBY
One Chase Manhattan Plaza
New York, New York 10005
Attorney for Petitioner
Squibb Corporation

Of Counsel:

CRAVATH, SWAINE
& MOORE

ROBERTS B. OWEN
888 Sixteenth Street, N. W.
Washington, D. C. 20006
Attorney for Petitioner
The Upjohn Company

Of Counsel:

COVINGTON & BURLING

JOHN D. FRENCH
Northwestern Bank Building
Minneapolis, Minnesota 55402
Attorney for Petitioners
Bristol-Myers Company
Squibb Corporation
The Upjohn Company

Of Counsel:

FAEGRE & BENSON

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